THE APPROACH OF COURTS TO FOREIGN AFFAIRS AND NATIONAL SECURITY

This panel was convened at 9:00 am, Thursday, April 10, by its moderator, Ruth Wedgwood of the Johns Hopkins School of Advanced International Studies, who introduced the panelists: the Honorable Kenneth Keith, Judge, the International Court of Justice; the Right Honorable Lord Jonathan Mance, Judge, the Supreme Court of the United Kingdom; and the Honorable Brett Kavanaugh, Judge, the U.S. Court of Appeals for the D.C. Circuit.[*]

The Approach of the Courts to Foreign Affairs and National Security: A View from New Zealand and The Hague

By Kenneth Keith[†]

For reasons of geography, population, politics, and economics, the challenges in New Zealand in respect of foreign affairs and national security issues are fewer than in the United States and in the United Kingdom. But there is relevant material from which I can select and to which I will add related material from the experience of the International Court of Justice.

I begin with two general propositions. The first is that the New Zealand courts have, fairly consistently over the years, proceeded on the basis that international law is part of the law of the land and that legislation, if possible, should be interpreted consistently with the international obligations of New Zealand. I need to make the important qualification that the executive has no power to change national law by entering with a treaty: legislation is in general needed for that purpose. A very early instance of the positive attitude comes from 1874. A murder was allegedly committed on an American barque on the high seas. The first port it reached was Port Chalmers in the South Island of New Zealand. Did the New Zealand courts have jurisdiction over that alleged offense? Counsel for Charles Dodd, who had been convicted of manslaughter, argued that the New Zealand courts did not have jurisdiction.[1] International law gave exclusive jurisdiction on the high seas to the flag state. He referred the Court of Appeal, among other things, to leading textbook writers of the day—Vattel, Story, Wheaton, Kent, and Phillimore—all of whom supported that proposition. The Court, unanimously, read the relevant legislation in those terms. That decision, I might note, was not among the many decisions of national courts to which the Permanent Court of International Justice was referred when 50 years later it ruled in the opposite direction in the *Lotus* case[2]—a ruling which was reversed by treaty some years later. I might also note that the young, successful counsel in that case, Robert Stout, who was one of the first law teachers in New Zealand and with access to very good law libraries for that time and that place, later became Premier and Chief Justice, a New Zealand parallel, if you like, to William Howard Taft.

My second general proposition is that history—not just cases but also legislation and executive actions—demonstrates that much depends on the attitude of judges to the protection of liberty and, more broadly, to passions of the time. One case which demonstrates the willingness of civil courts to intervene in military matters at the time of supreme peril to

[*] Mr. Mance and Mr. Kavanaugh did not contribute remarks for the *Proceedings*.
[†] Judge, International Court of Justice (2006–2015).
[1] Rex v. Dodd (1874) 2 NZCA 598.
[2] (1927) PCIJ Reps. A/10.

https://doi.org/10.5305/procannmeetasil.108.0073 Published online by Cambridge University Press

the nation comes from New Zealand in 1944. Members of the returning furlough draft had refused to parade at Trentham Military Camp in January that year for embarkation to return to the Middle East. They were charged with desertion. A unanimous Court of Appeal overturned their convictions by courts-martial.

The holding, in a sense, was a straightforward interpretation of the word ''desertion.'' The offense of desertion occurs when a person ''absents himself physically from the control of duly constituted [military] authority with the intention either of not returning or of avoiding some important service or duty.'' The soldiers' actions did not constitute desertion in these terms because they remained under military control. But there are arguments that might well have led a court, in a time of great peril to the nation, to say that the actions were in effect desertion and fell plainly within the purpose of the legislation. So counsel for the government contended that a strong privative clause—depriving the civil courts of power to vacate or remove decisions of courts-martial—protected the decision of the court-martial to convict the soldiers. Might not the court have said that the ruling of the court-martial holding that the actions constituted desertion was a ruling that might be inaccurate as a matter of law but that nevertheless it was one which fell within the court-martial's jurisdiction? An associated argument was that the offense of desertion plainly fell within the jurisdiction of the court-martial, while the detail of the charge was of lesser significance. The Crown also strongly argued that the ''common law has never interfered with the army *flagrante bello''* that ''[g]reat caution must be observed not to interfere with military discipline,'' and that ''there must be a flagrant abuse of military authority before Civil courts should interfere.'' The Court was not willing, however, to go down any of those paths. It unanimously overturned the conviction.[3]

Against that case, however, it is possible to point to many challenges to the legality of proclamations of emergency which have failed, with questions being raised whether the matter was even justiciable. Challenges to emergency regulations and actions have also rarely succeeded, the exceptions, sometimes appearing in cases decided after the emergency is over, involving actions abrogating long-recognized rights such as access to the courts.[4] With that as background, I consider three issues. Given the constraints of time, I do not consider the detail of the legislation which has changed over recent years.

The three issues which have arisen in New Zealand cases in the last decade concern:

1. The powers of search and seizure of the New Zealand Security Intelligence Service (SIS).

2. The review by the court of a claim by the minister in charge of the Service of public interest immunity in respect of evidence sought by a plaintiff who was suing the Service for trespass.

3. A challenge to a decision that there were recognizable grounds for believing that a refugee was a danger to the security of the state and accordingly was not protected by the Convention Relating to the Status of Refugees. The court also had to consider how the New Zealand authorities were to assess whether the refugee, if deported to his country of nationality, was likely to be tortured or arbitrarily killed.

[3] Close v. Maxwell [1945] NZLR 688.

[4] See the cases assembled in New Zealand Law Commission, *Final Report on Emergencies* paras. 5.105–123 and Appendix C (1991) (referring to cases from Australia, Canada, India, Malaysia, New Zealand, and the United Kingdom).

1. Powers of Search and Seizure

Under the legislation in force at the time, the minister in charge of the SIS had the power to issue a warrant authorizing the interception or seizure of any communication if satisfied that the interception or seizure was necessary for stated security reasons. The SIS had entered the home of the plaintiff. He was involved in a GATT Watchdog Conference held in opposition to an APEC Trade Ministers' Meeting. Did the warrant to intercept or seize authorize that entry as the state argued? No, said the New Zealand Court of Appeal, referring to the ordinary meaning of the words, to the history of the provisions, to a related provision of the Bill of Rights, to comparable provisions elsewhere in the Commonwealth and to the commentaries by law reform agencies.[5]

2. Claims of Public Interest Immunity and Executive Privilege

In the same case the minister in charge of the SIS had filed a certificate claiming public interest immunity on national security grounds in respect of certain documents sought by the plaintiff. In a first hearing the Court of Appeal thought that the certificate was inadequate in several respects—its terms were too general and it was impossible to say where the correct balance lay—and gave leave to the minister to file an amended certificate. The court called attention to the varying meanings of ''security'' in the statute book.[6] In response, the minister released 20 documents in whole or edited form and submitted a new certificate, which used more specific terms. The court again reviewed in some detail the positions taken by the courts and legislatures in different national security contexts.[7] The court reviewed the detail of the new certificate and concluded that it could not take the matter further. It upheld the certificate.[8] Issues of a similar kind now also arise in international courts and tribunals and have indeed since at least the *Corfu Channel* case in the International Court of Justice over 60 years ago. A move to greater openness can be seen in a number of cases in different international jurisdictions over recent years.[9]

3. Possible Deportation to Danger

Amhed Zaoui, an Algerian national, was a refugee. The Refugee Status Appeal Authority so decided on August 1, 2003. The Director of Security, depending in part on the provision of the Refugee Convention denying protection to a refugee for whom there are reasonable grounds to regard as a danger to the security of New Zealand, issued a certificate to that effect. Mr. Zaoui could then be the subject of an order for deportation. Of the issues addressed by the New Zealand Supreme Court, I consider one—the protection of the right not to be returned to the risk of torture or to arbitrary taking of life.[10] I might also have mentioned the rejection by the court, with the support of the Solicitor-General, of a ruling made by the Supreme Court of Canada which would have assisted the state on one of the issues in dispute—an excellent example of proper behavior by a law officer. The state accepted that it was obliged to act in accordance with New Zealand's obligations under the relevant articles

[5] Choudry v. Att'y-General [1999] 2 NZLR 582, 590–93.

[6] [1999] 2 NZLR 582, 593–97.

[7] [1999] 3 NZLR 399, 403–06.

[8] *Id.* at 407–08; for the dissent, see 408–23.

[9] *See, e.g.,* The ICJ and the Evolution of International Law: The Enduring Impact of the *Corfu Channel* Case (Bannelier et al. eds., 2012), chapter 8.

[10] Att'y-General of New Zealand v. Zaoui (No. 2) 2006 1 NZLR 289.

of the International Covenant on Civil and Political Rights and the Convention Against Torture. How was that to be achieved? The court referred to the related prohibitions of the Bill of Rights, prohibitions which did not expressly apply outside New Zealand. But it said that the related treaty provisions had long been understood as applying to actions taken by a state party, for instance, by deportation or extradition, where there were substantial grounds for belief of a real risk of torture or arbitrary death. To go back to a point I made at the outset, the relevant power, here of deportation, should be read consistently with that interpretation of the treaty provisions if possible. The court considered that that reading was possible and accordingly Mr. Zaoui received that protection.

To recall my second introductory point, much also depends on the temper of the times and the sense of responsibility and integrity of the relevant state officials and their lawyers, especially ministers, the law officers, and the judges. You might see, in the cases I have mentioned, the commitment by those individuals to their responsibility to ensure that the state operates within the law, including international law.

https://doi.org/10.5305/procannmeetasil.108.0073 Published online by Cambridge University Press